In the Supreme Court of the United States.

DECEMBER TERM, 1868.

UNITED STATES, appellants,
vs.
THE SCHOONER DIANA AND CARGO } No. 87.

Appeal from the District Court of the United States for the southern district of Florida.

WM. M. EVARTS,
Attorney General.
J. HUBLEY ASHTON,
Asst. Att'y Gen'l.

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THE CASE.

The schooner Diana was captured on the 26th of November, 1862, by the U. S. steamships Kittatinny and Henry Janes, off Pass Cavallo, on the coast of Texas, (Rec., p. 5,) and taken to Key West for adjudication as prize of war.

A libel in prize against the vessel and cargo in the District Court for the southern district of Florida, on the 17th of December, 1862. On the 26th of the same month a claim was filed by the master of the vessel in behalf of John Cabada, of Campeachy, Mexico, the alleged owner of the schooner, and in behalf of Miguel Canno, a Spanish subject residing at Campeachy, the alleged owner of the cargo. On the 6th of

February, 1863, a claim was filed by Idela Cabada, alleging his ownership of said vessel, and that the owner of the vessel had let her to one Miguel Canno on freight for a voyage from Campeachy to Matamoras, Mexico, in good faith. (Rec., p. 4.)

On the 17th of February, 1863, a decree of restitution was entered, from which decree the United States appealed. (Rec., p. 65.)

ARGUMENT FOR APPELLANTS.

At the time of capture the vessel was attempting to run into a blockaded port on the coast of Texas.

From the ship's papers it appears that the vessel was on a voyage from Campeachy to Matamoras, and was consigned to one Jose San Roman, at the port last named.

When captured the vessel was near the port of Matagorda, off the coast of Texas, (Rec., p. 7.) She was fourteen days from Campeachy, and was 200 miles out of her direct course, having deviated therefrom on the third day out from Campeachy. She was seeking to enter a blockaded port.

The master, in his deposition taken *in preparatorio*, in answer to the 22nd interrogatory, says, "that the port from which said vessel sailed was not under an order of blockade by the government of the United States, but the port to which said vessel was bound was under such order of blockade, at least such part of it as was under the jurisdiction of the United States." (Rec., p. 8.)

In answer to the sixth interrogatory he says, "the first port the vessel would have entered had she not been captured would have been the nearest convenient port of entrance, and the second would have been Matamoras." (Rec., p. 5.)

In answer to the 56th interrogatory he further says,

"that for twenty-four hours previous to the capture said ship was steering toward the coast of Texas, in hopes to make a harbor, or beach, or something." (Rec., p. 9.)

One of the seamen found on board, in answer to the 6th interrogatory, says, "the vessel would have entered first the port of Cavallo." (Rec., p. 11.) The same witness, in answer to the 36th interrogatory, further says, "they were running along the coast for an entrance, and that at the time of the capture the captured vessel was only some three miles from the light-house on Pass Cavallo point. (Rec., p. 14.)

It was the purpose of the voyage and the intention of the master to violate the blockade, in order to trade with the enemy.

In excuse for the position in which the vessel was found and of the conceded intention to violate the blockade, it is alleged that when three days out from Campeachy damage had resulted to the rigging of the vessel, causing her to deviate from her course, (Rec., p. 9,) and that the master approached the coast "from no other motive than that of seeking shelter to repair the damage of his vessel." (Rec., p. 56.)

Such was not the real motive of the master.

I. The joint letter of instructions from the owner of the vessel and the owner of the cargo to the master, which proves that the consignment to Ramon at Matamoras was merely colorable. The master was the real consignee, and the procurement of cotton was the object of the voyage, and the master was supplied with money to make purchases of "*the article*" which had been mentioned to the master "*verbally.*" The letter of instructions referred to is as follows:

[Translation.]

CAMPEACHY, *Nov'r 10th* 1862.

Dn. Pedro Jaurequiberry, present:

DEAR SIR AND FRIEND: We think it advisable to hand you this letter of instructions in order that you may remember with greater facility and precision the objects of the voyage to be undertaken to-day by our pilot boat "Diana," of which vessel you are master.

You have ample authority to dispose of the goods which are on board of the vessel, and to invest the proceeds in *the article* which we have mentioned to you *verbally*, not forgetting that our wishes as well as your personal interest consist in making the most of the article referred to.

Although the vessel goes consigned to Dn. Jose San Roman, you will do what you consider best for our interest. You should not disburse any money while you are able to make purchases from the proceeds of the invoice, and of such ship's stores as you can conveniently dispense with after reserving a sufficient quantity for the return voyage.

As we are embittered by the war which France has declared against the republic, upon the return voyage you will touch at Sisal or Celestun, where you will receive our instructions.

You will keep an accurate account of all moneys disbursed by you, in order that we may determine whether to continue or not these expeditions. We omit any further instructions which we might give, having full confidence in your intelligence and activity.

We conclude by wishing you a safe voyage, and by acknowledging ourselves

Your friends, &c,

(Si'd) CANO & CABADA.

(Record, p. 32.)

II. The cargo consisted of articles which must have been as abundant and cheap at Matamoras as at Campeachy, and which were greatly needed by those in the enemy's country. The cargo was in part rice, starch, coarse flannel, paper, nails, rum, brandy, shoes and cigars. (Rec., pp. 28 and 29.)

III. There was on board, ostensibly as a passenger, an Englishman, whose name appears in the ship's papers as George Stites, but whose real name was George Chase, and who was a pilot and a resident of Lavaca, Texas. (Rec., p. 17 and p. 63.)

IV. An intent to run the blockade in the prosecution of illicit trade was admitted at the time of the capture.

Acting Master Atkinson, U. S. N., in his deposition taken by leave of court, says, rec., p. 60:

Answer. When I first boarded the "Diana," her master said that he supposed our vessel was a Mexican schooner, and also the schooner Matilda, which was in port, but had been captured by us the day before, and that his purpose was to run the blockade; that he had before attempted to do so at St. Louis Pass and did not succeed. The same statement was made to me by the pilot of the Diana, who was part owner of the cargo.

(Signed) EDWARD BARRETT,
Lieut. Commander, U. S. N.

Acting Master Samson in his deposition says:

Answer. There seemed to be little doubt on board the Diana but that she would be condemned. The captain of that vessel urged upon us other articles not accepted. George W. Chase, a passenger on board the Diana, a resident of Lavaca, of Texas, and part owner of the cargo, and who said he was engaged to act as

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Answer. There seemed to be little doubt on board the Diana but that she would be condemned. The captain of that vessel urged upon us other articles not accepted. George W. Chase, a passenger on board the Diana, a resident of Lavaca, of Texas, and part owner of the cargo, and who said he was engaged to act as

her pilot in entering Matagorda bay, or any other convenient port of Texas, stated that she was intended to violate the blockade. He made a written acknowledgment to this effect, in presence of several witnesses.

(Signed) EDWARD BARRETT,
Lieut. Commander U. S. N.

V. The position of the vessel at the time of the capture renders it grossly improbable that the intention of the master was an innocent one. Port Cavallo light, within three miles of which the capture was made, stands at the entrance of Matagorda bay. The town of Lavaca, Texas, is at the head of the bay. On her voyage from Campeachy the vessel passed Matamoras and went two hundred miles beyond, and away from her port of destination. Port Cavallo light is two hundred miles northeast of Matamoras.

If the vessel was in distress, her distress was, in all probability, occasioned by voluntary and intentional exposure, made for the purpose of receiving some injury that would cloak the real object of the voyage. The vessel measured but 54 tons, and a voyage across the Gulf, in the month of November, was a hazardous one. The first accident that happened, and which was a trifling one, being the breaking of the clamp of the hook of the foresail, was made the excuse for a deviation from her course, when only three days out from Campeachy. (See log, rec., p. 42, and testimony of captain, rec., p. 9.) Certainly the injuries the vessel suffered did not constitute that "absolute and unavoidable necessity which will justify a breach of blockade."

2 C. Robinson, 124.
5 C. Robinson, 27.
3 Wallace, 222.

The court has a right and will take notice of the fact that this vessel was commanded by "Pedro Jaurequiberry of Campeachy," and that a person of the same name residing at the same place commanded the schooner Sea Witch, which was captured off the coast of Texas, for an alleged intention to violate the blockade, and was released upon the ground that while on a voyage from Matamoras to New Orleans she was driven out of course by stress of weather and injuries received—the identical excuse of which the claimants seek to avail themselves in this case. See the case of the Sea Witch, 6 Wallace, 242.

Upon the question of the right of the court to take into consideration this fact in the history of the master, reference is made to the following cases:

The Juffrouwn Elbright, 1 Rob., 128.

"*In which Sir Wm. Scott says this ship is claimed for Mr. Reid, who is not a novus hospes in this court.*"

Also the Argo, 1 Rob., 128.

The Nancy, 3 Rob, 122.

The Experiment, 8 Wheaton, 261.

The decree of the court below should be reversed.

WM. M. EVARTS,
Attorney General.
J. HUBLEY ASHTON,
Asst. Att'y Gen'l.